United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1495

To be argued by
THOMAS J. O'BRIEN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

SAVERIO CARRARA, MICHAEL DE LUCA, ANTHONY DI MATTEO, BARIO MASCITTI, JAMES V. NAPOLI, SR., JAMES NAPOLI, JR., EUGENE SCAFIDI, SABATO VIGORITO, and ROBERT VOULO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT
JAMES NAPOLI, JR.

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Original

TABLE OF CONTENTS

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-against-

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JAMES NAPOLI, JR.,
EUGENE SCAFIDI,
SABATO VIGORITO,
ROBERT VOULO,

Defendants.

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QUESTIONS PRESENTED

1. Whether the court erred in refusing to grant a mistrial and severance after its dismissal of the conspiracy count?

2. Whether the appellant James Napoli, Jr. has standing to suppress the fruits of the electronic surveillance conducted at the Hiway Lounge?

PRELIMINARY STATEMENT

The defendant, James Napoli, Jr., was indicted together with 21 co-defendants and charged with violating 18 U.S.C. §§ 1962, 1963, 1510, 1955, 1952, 2 and 371. Prior to trial two of the defendants and three of the seven counts were severed and 20 defendants proceeded to trial on a four count indictment. For the convenience of the Court and the jury the remaining counts were renumbered one through four.

Count one charged the defendants, Annarumo, D'Avanzo, Scafidi and Voulo with operating an illegal gambling business between March 1972 and July 1972 in violation of 18 U.S.C. §§ 1955 and 2.

Count two charged the defendants, Di Matteo, Mascitti, Riccardi, Scafidi and Voulo, with operating an illegal gambling business from December 13, 1972 to March 9, 1973, in violation of 18 U.S.C. § 1955 and 2.

Count three charged the defendants, Annarumo, Carrara, Cassella, De Luca, Di Matteo, Lotierzo, Maccirole, Mascitti, Mascuzzio, Napoli, Sr., Napoli, Jr., Rodziewicz,.Vigorito and Voulo with operating an illegal gambling business from April 13, 1973 until June 15, 1973 in violation of 18 U.S.C. § 1955.

Count four charged all 22 defendants with conspiring to operate an illegal gambling business from February 26, 1971 through May 1, 1975 in violation of 18 U.S.C. § 371.

At the end of the government's case, the court dismissed the conspiracy on the grounds that there was a fatal variance which resulted in prejudice to the defendants. The court also granted the defendants, Cassella, Pinto, Rossi, Altese, Simonelli and Pirone, motions for judgments of acquittal.

The case was then submitted to the jury on the remaining defendants and the jury acquitted 3 defendants and convicted the others.

James Napoli, Sr. and Jr. were both convicted on count three, the only remaining count in which they were charged. Thereafter, the court sentenced the defendant, James Napoli, Jr. to three years imprisonment, two years probation and a fine of $20,000. It is from that conviction that the defendant appeals.

STATEMENT OF FACTS

At the close of the government's case, the government conceded that the evidence on the conspiracy count showed at least three and possibly six different "legs". (TR 5507)*. The evidence which the government contended supported the first "leg" consisted of the following.

Physical evidence of policy work seized on June 16, 1971 from an apartment at 405 Elderts Lane, Brooklyn, New York while the defendants Voulo and Scafidi were present. (TR 5588) Physical evidence of policy work seized on May 1, 1972 from 967 East 2nd Street, Brooklyn, New York while the defendant Voulo was present. (TR 5589). A seizure by Agent Queener on September 13, 1972 of a bag containing policy office work thrown in the trash by the defendant Mascitti. (TR 5589). Tapes of a wiretap on the defendant, Scafidi's phone at Howard Beach which revealed conversations between Mr. Scafidi, Mr. Voulo and Mr. Mascitti, regarding

* TR-Transcript of the trial minutes
A -Appellants joint appendix
H -Hearing on standing

the policy business. (TR 5592). Tapes of intercepted conversations at apartment 309 at 815 27th Avenue in Queens between Mr. Mascitti, Mr. Di Matteo and Mr. Riccardi regarding policy in December, 1972. (TR 5590-5591). And finally, seizures of policy work from Mr. Simonelli on June 21, 1974.

The second "leg" consisted of evidence of seizures from Mr. Lotierzo on February 26, 1971 and from Yonkers on June 15, 1971 which contained the fingerprints of several of the defendants other than either Napoli, Sr. or Jr. (TR 5598-5600). The other seizures which the government contended supported "leg" two including the street searches in February and March, 1972, a search of a car on December 10, 1972 and a seizure of an apartment at 715 Fifth Avenue and a seizure from Mr. Pirone, Mr. Lotierzo and Mr. Riccardi in 1972. (TR 5603-5612).

The government contended that the third "leg" of the conspiracy was the Jersey "leg" which operated in April and May of 1973 and was supported by the conversations intercepted at the Hiway Lounge in April and May 1973. The government argued that those conversations between Mr. Napoli, Sr., Jr., Mr. Cassella and Mr. Radziewicz reveal that there was a price war going on in New Jersey between everyone in the policy business in New Jersey and that Mr. Napoli, Sr. was attempting to solve the problem. (TR 5616-5618).

In an attempt to tie together all the various independent pieces of evidence or alleged proof of "legs", the government called a gambling expert, FBI agent Harker. Agent Harker testified that he examined all the physical evidence seized by the government and that he was able to separate the evidence into two groups. The first group, he testified, consisted of the seizures made on June 16, 1971, May 1, 1972, September 13, 1972 and June 21, 1974. He identified this group from the use of a common code found on the policy work, such as XX, Sal, Levy, and Russ P. (TR 5228-5230).

The second group was identified by Agent Harker from a different code (OM-TOL) found on the physical evidence seized on February 26, 1971, June 15, 1971, November 4, 1971, March, 1972, December 10, 1972 and March 24, 1975. (TR 5230).

He testified that he could not reach a conclusion based upon the evidence he examined that the two groups or "legs" were part of the same operation. (TR 5212-5213). He stated that although there were some common denominators between group 1 and group 2, such as carbon ribbons and common code letters, no conclusion could be drawn since these factors are either typical of most New York number operations or not sufficient evidence for him to base an opinion that group 1 and group 2 were the same operation. (TR 5213, 5231)

The only evidence introduced by the government against either James Napoli, Sr. or Jr., in a trial that lasted seven weeks, was the defendants' conversations intercepted at the Hiway Lounge in April and May, 1973.* That evidence together with eavesdrop evidence obtained in Apartment 309, a count in which neither Napoli was named, was relied upon by the government to show the Napolis' participation in the conspiracy and count three.

At the end of the government's case, Mr. Newman, defense counsel for Mr. Vigorito, was, at the request of the court, designated to argue, on behalf of all the defendants, the question of variance or proof of multiple conspiracies. (TR 5632-5637).

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* Defendants disputed that it was their voices on the eavesdrop recordings. Napoli, Sr. and Jr. submitted charts made from the government's surveillance testimony which established that they were outside the building at times when he was alleged to be in the intercepted conversation inside. These charts were enough to have created a reasonable doubt.

Moreover, the government failed to play the voice exemplars of the defendants to the jury because, as the government admitted, the exemplars sounded somewhat different from the seized conversation. (TR 6679-6682) In addition several agents testified that at the time they intercepted James Napoli, Jr.'s voice they were unable to identify it. They identified it several months later after another agent identified Junior's voice to them. (TR 3354-3365; 3449-3453, 3598-9, 3667-3673, 3852, 4215-4216, 4270) When a demonstration was held to determine whether Agent Heaney could identify James Napoli, Jr.'s voice on the tapes played in court, he failed to identify Napoli's voice on several occasions and contradicted Agent Swint's identification on another occasion. (TR 4073-4082, 4114-4115) All the agents' voice identification testimony was also impeached on cross examination by admissions of prior misidentifications of voice (TR 3445; 3468, 3469, 3595, 3596, 3676, 3852-3856, 4217-4225, 4238-4242, 4271-4285, 4378-4379, 4737-4738) It is the position of defendants Napoli, that had they been tried separately and particularly had the conversations intercepted in Apartment 309 not been received, the jury would probably have acquitted them.

Relying upon United States v. Bertolotti, 529 F.2d 149, (2d Cir. 1975) and other authorities, he argued that while the indictment charged a single conspiracy, the proof showed multiple conspiracies. That variance it was argued, was so prejudicial to the defendant as to require dismissal of the conspiracy count. Mr. Newman pointed out that the government was aware that there was more than one conspiracy, since even its expert was unable to testify that the evidence showed a single conspiracy. He argued that even if Mr. Napoli, Sr. was the common link to the three "legs" of the operation that fact was insufficient to prove a single conspiracy. He further argued that each of the defendants was prejudiced by the jury hearing weeks of inadmissable prejudicial testimony which the government could not tie into a single conspiracy. (TR 5637-5656).

Mr. Wofsy, counsel for the New Jersey Defendant Cassella, against whom the third substantive count was dismissed, supplemented Mr. Newman's argument. He argued that the government's proof of the third "leg" of the conspiracy, which the government conceded was the New Jersey "leg", dealt with illegal gambling in New Jersey rather than New York. He argued that since the indictment charged a single conspiracy to violate New York law, proof that showed a violation of New Jersey law constituted a fatal variance. (TR 5683-5690).

Thereafter, the court dismissed the conspiracy count holding in part, as follows:

> "[T]he Government claims that there are three parts to this conspiracy, one basically located in Brooklyn during the period of June 16, 1971 to June 21, 1974. And the second part, which the Government calls legs, basically, and working out of Yonkers during the period that is referred to, in December of 1969 to March 1975.
>
> And the last leg from April 15th to May 15th, in that area, is called the Jersey part. The Government claims that the welding force in all this conspiracy or in this conspiracy, rather, is James Napoli, Sr., who is the link.
>
> Now, James Napoli's involvement or rather proof of his involvement first came to the attention of the authorities, as far as this case is concerned, may have had suspicions, in the bugging of the Hiway Lounge in April, 1973, and continuing thereafter for a few months.
>
> There is some indication that he exercised control over the Brooklyn part for some period of time prior to April, 1973.
>
> Certainly for a period of at least six months, and the fact that he loaned Mr. Altese some money might show that he exercised some authority or control over part of the Yonkers[*] leg or part -- but the Government says the Yonkers portion goes back as far as 1969, though the conspiracy alleged in the indictment is 1971, as the commencement.
>
> There is no showing that Napoli, in any way, exercised any control over that part of the conspiracy.

*Altese was not involved in Yonkers. He and Pirrone were arrested in the March 1975 seizure in Brookyn. This was the only direct evidence as to Altese. See TR. 1363-1427.

Mr. Barlow: That's not true, your Honor. It hasn't been argued yet. That's why --

The Court: I'm rendering my opinion, Mr. Barlow. I won't hear any further argument.

I'll even assume what Mr. Barlow said, that there is some evidence, because he said that he's been in the business for five years, but that doesn't show that he exercised authority over the Westchester part in the manner in which the Government says he exercised control over the Brooklyn portion.

But I don't have to reach that because it's clear that the Jersey leg or part, at lease clear to me, that it is here improperly.

I find a difference in the role that the Government shows as exercise by Mr. Napoli.

More importantly, I find a difference in the purpose of the New Jersey portion.

The New Jersey portion of the conspiracy is alleged to be based on violation of New Jersey law and the operations that are based in New Jersey.

The mere fact that it constitutes a violation of New York law to talk about or conspire about operating policy in New Jersey does not change this object of this conspiracy.

The object of this conspiracy is shown was to operate a New Jersey branch, based on a New Jersey violation. It's a different statue, the personnel is [sic] different.

Mr. Napoli's role is different and I find that at least two conspiracies are alleged, maybe three. But that the New Jersey leg was actually a different conspiracy.

For that reason, I dismiss Count Four, Count Seven, in the indictment." (TR 5711-5714 A 145-150)

After the conspiracy count had been dismissed, each defense counsel moved for a severance and a mistrial on the grounds that they were prejudiced by the introduction of evidence that was admitted on the government's theory of a single conspiracy. The court denied both motions (TR 5747-5749 A 160-162) and instructed the jury as follows:

> The Court: "Good morning -- good afternoon.
>
> In your absence, I've dismissed Count 4 of the indictment, and that means that the defendants Frank Altese, Martin Cassella, Frank Pinto, Carmine Pirone, Kenneth Rossi and Joseph Simonelli are no longer before you.
>
> I also dismissed Count 3 against the defendant Annarumo, Cassella.
>
> Now, the dismissal of a count of the indictment or the dismissal against a defendant as to a count simply means that I found, as a matter of law, that there wasn't enough evidence in the case to submit to the jury as to that count.
>
> That has no effect whatsoever, one way or the other, as to any of the remaining defendants as to any of the remaining counts.
>
> All I found is that there was not enough evidence for you to consider. I don't weigh the credibility of the evidence. I don't weigh the weight of the evidence. I don't weigh the effect of the evidence. That's solely for you.
>
> Now, because I dismissed the count and I dismissed the count against Simonelli and Cassella, or I dismissed Count 3 as to Cassella and Annarumo, it means the focus of attention as to the issues in the case is somewhat shifted.
>
> There is some evidence which related only to Count 4 which, of course, is no longer in

the case. So, for example, the seizure at 100 DeHaven Drive up in Yonkers, where the items were found in a pillow case, for example, is no longer in the case.

That applied only to Count 4. So that is stricken from the record and I ask you to disregard it. There are other considerations because of striking Count 4 and I'll briefly refer to them.

The three remaining counts are what we call substantive counts. They charge that five or more defendants were in the policy business during different periods of time. When we talk about a business, joint enterprise, we think of the partners binding each other as to matters that are said and done during that term, the term of the business, and on matters concerning that business in this case, policy.

Since you have three separate, distinct businesses charged, you must be careful in assessing testimony against one partner when he isn't present, when he wasn't aware of what was said or done.

The absent partner is only bound by the partners he has in a particular business and during that particular term. So, for example, if you have, as you have in Count One, the defendants Annarumo, D'Avanzo, Scafidi and Voulo, and that business is alleged to have been conducted from December 13, 1972 to March 9, 1973. Or, for example, if there is testimony that Mr. Scafidi or Mr. Voulo said or did something, they are charged in two counts.

Now, Mr. Annarumo or D'Avanzo may be bound, if you find that they are part of the same business and it was said or -- and done during this time, for the purpose of the business if it occurred during March 1972 and July 1972.

But it would be improper to try Mr. Di Matteo or Mr. Masciti or Mr. Riccardi with that conversation if it occurred before their business started, which was the next December.

So it's only during the term of that conspiracy or that business -- I call it conspiracy, but it's a joint enterprise -- during that business. And it you're going to charge a partner of a business -- we will call them a partner -- with anything his co-partner said, make certain that the absent partner is a member, a partner, of that business and what was said during the time he was a partner, and what was said was said for his, the absent partner's, advantage as being a partner in the business and to promote the business. That's one thing I think you have to be alerted to.

The second thing is this:

For example, the Government introduced a seizure of Mr. D'Avanzo on November 4, 1971. Well, the charge is that he wasn't part of the business until March of 1972, more than a year before.

- - -

The Court: The time isn't too important, I don't care if it's a month before, a day before, a year before. The point is that the charge is that the business started about March, 1972.

But one thing is certain, that the other members charged are not bound by what happened to Mr. D'Azanzo. There was no business until -- I will try to be a little accurate -- December, January, February or March, maybe four months later.

That evidence -- and if you believe the evidence and if you believe it indicates engaging in policy business - is before you for a very, very limited purpose.

The Government is, in proving a charge, must prove that an accused acted with criminal intent; that it was a policy business; and that he deliberately and with intent voluntarily performed those acts; that he was part of that gambling business that started in March of 1972; and that he didn't do it innocently or accidentally.

So you may use that seizure in November 1971 solely against Mr. D'Avanzo, if you believe it is part of policy business to determine whether what he did in the business that began in March of 1972 was with criminal intent, that it wasn't innocent.

But you must guard against convicting an accused for a charge in the indictment that is not proven, merely because you have evidence that at another time he did do something that was illegal. That wouldn't be right.

A defendant under our system need only prepare to meet a charge in the indictment and nothing else.

So this is proof only if you believe it's proof of criminal intent -- this is proof against Mr. D'Avanzo of Count One during the period that started in March of 1972.

I hope I made myself clear on that.

The same thing is true of a charge against Mr. Lotierzo. Mr. Lotierzo is charged with being part of a gambling enterprise beginning April 13, 1973. There is evidence of a seizure of some material on February 26, 1971. The Government claims that this gambling material is proof that he was engaged in policy.

Well, don't use any of that evidence against the others that happen to be charged with the same count. That wouldn't be fair.

And again, you may only use it for the limited purpose of determining whether, if you find Mr. Lotierzo performed certain acts, that gives the appearance of criminal activity. And if the Government proved beyond a reasonable doubt that those acts did show participation in the gambling business.

Now, when you come to determine whether Mr. Lotierzo understood and was aware tht he was engaged in policy and that he deliberately and intentionally and voluntarily engaged in policy, knowing that it was illegal, you may use the prior seizure, if you determine that it does

show policy, to determine whether those actions were the criminal intent or whether they were done innocently.

Now, I can't think of any other evidence that should be stricken, but the point is, and the rule is, that if it was related only to Count Four and it was unrelated to any of the remaining counts, you should just disregard it.

And I think we are ready for the defendants." (TR 5799-5805, A 165-171)

After a discussion in the absence of the jury the court supplement its instructions as follows:

The Court: "I would like to correct something I said is the reason for dismissing Count Four.

I dismissed Count Four because the evidence did not conform to the manner in which the charge was stated in Count, and so it was dismissed. It was entirely a legal reason.

The other thing I have been asked to advise you about is the treatment of the tapes that you heard. Now, when it comes to the tapes heard at the Hiway Lounge, if you recall, those tapes were -- the conversations were intercepted from April 1973 to June 1973.

- - -

That's the only testimony that supports Count Three, and you should consider no other testimony." (TR 5815)

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO GRANT A SEVERANCE AND A MISTRIAL

But for the conspiracy count, joinder of the Napolis, who were only charged in count three, with other defendants, who were charged with similar but unrelated crimes in counts one and two, would have been improper under Rule 8(b) of the Federal Rules of Criminal Procedure.* For as this Court said in United States v. Schaffer 266 F.2d 435, 440 (2d Cir. 1959):

> "Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b) Federal Rules of Criminal Procedure 18 U.S.C For there would be no common participation 'in the same act or transaction constituting an offense which is a requisite to Joinder'"

(*) After the conspiracy count was dismissed logic seems to dictate that the same result would follow since the remaining counts charged wholly unrelated crimes. The majority decision of the Supreme Court in Schaffer v. United States 362 U.S. 511 (1960), disagrees and therefore this point is raised merely to reserve it if a further appeal is necessary.

While holding that dismissal of the unrelated substantive counts is not per se mandated by the dismissal of the common conspiracy, the Supreme Court in Schaffer v. United States, 362 U.S. at 516, issued the following admonition:

> "We do emphasize, however, that, in such, a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice."(*)

The facts here are clearly distinguishable from those in Schaffer. In Schaffer, the conspiracy count was dismissed by the court for "failure of proof" 362, U.S. 511, 513. Here, the conspiracy count was dismissed under the teachings of Kotteakos v. United States, 328 U.S. 750,(1946) and United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) on the grounds that since the government proved two or three conspiracies under an indictment charging a single conspiracy there was a variance, which was so prejudicial as to require dismissal. We submit that the same prejudice which required Judge Mishler to dismiss the conspiracy count required him to grant a severance and new separate trials under Rule 14, Fed. R. Crim. Pro.

(*)The force of this admonition is undiscorded by the fact that the four dissenters believed that dismissal of the conspiracy mandated severance and new trials.

Moreover, unlike the facts herein, the petitioners in Schaffer "not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial" 362 U.S. at 516.

Other factors which distinguish our case from those in Schaffer follow:

a. Schaffer involved four defendants and a two week trial while our case involved 20 defendants and a six week trial.

b. In Schaffer virtually every offer of proof, testimony or exhibit, was followed by an instruction that the proof admitted with respect to one defendant was not to be considered with respect to any other defendant while in our case, with few exceptions, all proof was admitted with the admonition that it was being taken subject to connection on the conspiracy count.

c. Unlike Schaffer, the witnesses in our case were not called in orderly fashion but rather were called and then recalled on numerous occasions so as to lump all defendants together.*

* At one point Judge Mishler himself stated

> "I strongly disbelieve of the method in which the government is trying this case and if it continues I may ultimately find that because of the lack of preparation and lack of proper presentation find that the defendants' due process rights are violated and dismiss the whole thing." (TR 460)

Objection was repeatedly made to this disorganized presentation on the ground that it deprived defendants of effective cross-examination on voice identification (TR 3726-29, 3733, 4316) Each of the FBI Agents Hendrickson, Heaney, Mitchell, Parsons, Queener, Swint, Lahey and Liesegang were called and then recalled by the government on at least 5 different occasions.

d. A claim was made in the case at bar that the conspiracy count was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial. (TR 5641-5642) At the time the superseding indictment was drafted the government knew that there were at least three "legs" to the conspiracy. One of the "legs" involved a violation of New Jersey law and the government charged only a violation of New York law in the conspiracy count. In addition, the government knew that its expert could not tie the remaining two "legs" to a single conspiracy.

The only evidence introduced by the government against either James Napoli, Sr. or Jr. to support count three, the only count in which they were named after the conspiracy count was dismissed, in a trial that lasted over six weeks, was the defendants conversations intercepted at the Hiway Lounge in April and May 1973. (TR 5815) Had the jury not heard the inadmissable evidence we submit that a different result could well have followed.

Part of the intercepted conversations at the HiWay concerned an illegal gambling operation in New Jersey, which was

not part of the crime the Napolis were charged with in count three. That evidence was admitted solely as proof of the New Jersey "leg" of the conspiracy. The court, however, failed to so instruct the jury and told the jury that they could use all the Hiway tapes in considering count three. (TR 5815)

Not all of the intercepted conversations of James Napoli, Jr. were incriminating. FBI agent Harker, the government's gambling expert, identified only three conversations which he said were related to gambling. The first conversation, April 30, 1973, he testified concerned withholding payments "presumably" to runners. (TR 5302)

The second and third conversations on May 7 and 14, 1973 concerned Mr. Napoli, Jr. discussing figures with Mr. Napoli, Sr. Mr. Harker said that those conversations referred to the balances owed by various controllers. (TR 5309-5310) No physical evidence of gambling was ever seized from the Hiway nor was Mr. Napoli, Sr. or Jr. ever seen in the vicinity of any place where the seizures of physical evidence were made or otherwise connected, by evidence admissable against them, with an illegal gambling business.

The bulk of the evidence dealt with the thousands of pieces of physical evidence seized at various places as well as conversations intercepted over either Mr. Scafidi's phone or at

Apartment 309 at 815-27 Avenue in Queens. That evidence, which was introduced to prove the conspiracy count and counts one and two, was totally irrelevant to the charge in count three and highly prejudicial to the Napolis.

The physical evidence clearly showed large scale policy operations. The government contended from its opening statement through its summation that the Napolis were the heads of this operation. On many occasions during the interception at apartment 309 the Napolis were implicated by statements made by other defendants. For example, on one occasion Anthony Di Matteo while obviously referring to his employment in the policy business says "Nobody's my boss but Jimmy Nap". (TR 3247).*

On other occasions in conversations between Mr. Mascitti and Mr. DiMatteo, the Napolis are mentioned as superiors. For example, in discussion their responsibilities and work Mr. DiMatteo says "You don't like it go see Jimmy Napoli", to which Mr. Mascitti replies, "You can't, $6000 you owe and when its done and your done paying him then I can see him." (TR 2168) Mr. DiMatteo also tells Mr. Mascitti, "Jimmy Napoli told you to know what a dollar is. Watch yourself" (TR 3093); "So now he's

* Timely objection was made to the introduction of this most incriminating hearsay on the ground that, inter alia, that the statement was not made in furtherance of the conspiracy. (TR 2771, 3089)

walked out so Jimmy Jr. is eating a hero like this. (TR 3245) "Go see Jimmy Napoli and ask Potty, ask him what he wants" (TR 3012) "Joe Black says I had to see Jimmy Nap on something else, he says. I didn't do nothing wrong" (TR 2865). While discussing the policy business Mr. Mascitti also mentions Napoli saying, "I'm telling you call Jimmy and you'll see the Zube tonight" (TR 3169) "I think you should go to the old man and ask tonight (TR 2899)

All the above conversations occurred prior to the time the crime charged in count three is alleged to have commenced. Additional significance was placed on those conversations by the physical surveillance made by the FBI Agents. For example, after the conversation in which DiMatteo advised Mascitti to go see Jimmy Napoli tonight, an agent testified that such a meeting took place that evening. (TR 2070). Other physical surveillance also linked James Napoli Sr. and Jr. with the persons whose conversations were seized prior to time the crime charged in count three is alleged to have occurred. (TR 1858-9, 1869-70, 2070) Physical surveillance also put the Napolis together with the defendants, from whom policy work had been seized, at times other than those alleged in count three (TR 1874-5 1970) thereby establishing guilt by association.

While it is true that the court instructed the jury both at the end of the government's case and in his charge that the tapes intercepted in April and May at the Hiway were the only evidence they should consider in determining count three, we submit that it was impossible for the jury to do so. This is especially true in light of the emphasis placed on the other evidence in the government's summation.

During his summation on counts one and two the prosecutor frequently referred to other defendant's conversations concerning the Napolis. For example, he recites a conversation where a person involved in the policy business said he had to go "see Jimmy Nap" because that person did something wrong. (TR 6048) On a second occasion another person said he had to "see Jimmy Nap" at the Hiway to get money for the policy operation. On that second occasion, Mr. Napoli, Sr. was not at the Hiway so the person said he spoke with Mr. Napoli, Jr. regarding the money. (TR 6051-6052) He also pointed to surveillance of other defendants being with the Napolis before the crime charged in count three was alleged to have begun in order to establish that the Napolis were the bosses. (TR 5052-6053, 6057) He also argued that Mr. Di Matteo's conversation occurring before the third count showed Napoli, Sr. to be his boss. (TR 6055)

By anology of the conversations at apartment 309 with the conversations intercepted at the Hiway as well as by references to the searches and Mr. Harker's testimony regarding the similarity of the controller's codes and carbon ribbons, the prosecutor very effectively demonstrated that the crime charged in count three was a continuation of the crimes charged in counts one and two involving the same people in one continuous operation with the Napolis in command. (TR 6088-6089, 6097, 6107-6108, 6112, 6115-6117, 6154-6155, 6158, 6161-6162, 6164, 6170-6172)

In his rebuttal summation the prosecutor referred to the evidence of the Yonkers search which the court struck and told the jury to disregard. (TR 6653) He maintained that the evidence showed a conspiracy which contained year after year involving persons from the lower levels to those on the top. (TR 6655-6672) In discussing count two he described testimony of a meeting between Simonelli, Riccardi, De Luca and James Napoli, Jr. and asked the jury:

> "[c]an't you consider other persons to show the relationship of the five named defendants in count two." (TR 6678)

In discussing Mr. Napoli, Jr.'s seized conversation at the Hiway, where he was discussing a series of numbers with his father, the prosecutor referred back to the evidence introduced to support counts one and two and asked the jury to find that the Napolis were discussing the same sort of numbers found on sheets offered in support of the first two counts. (TR 6687-6689)

The jury was asked to, and may well have, found the Napolis guilty on the inadmissible inculpatory statements of others, guilt by association, and evidence which would not have been admissible against them at a separate trial. We contend that the evidence against the Napolis, unless explained and understood in light of the inadmissible evidence, would be limited to the opinions of the FBI Agents that their voices appeared on the tapes and that those voices were discussing policy.

The Napolis were severely prejudiced by the wealth of evidence introduced to prove the two substantive counts, in which they were not named, as well as a conspiracy, which the prosecutor knew prior to trial could not be connected to a single conspiracy. That evidence, mostly damning hearsay statements and policy work seized from others, would not have been admissible against the Napolis at a separate trial and was highly prejudicial.* Moreover, the prejudice was compounded by the prosecutor's summation on that evidence.

As this court said in United States v. Branker, 395 F.2d 881, 888, 889, (2d Cir. 1968):

> "Apart from the prejudice inherent in any mass trial, a defendant in a trial in which the conspiracy count has been dismissed is likely to be prejudiced in defending the charges in the substantive counts by evidence, particularly hearsay testimony, which was admissible on the conspiracy count but which could not have been used against him in a separate trial on the substantive counts. One of the most dramatic of the many examples of this in the record before us is Cooper's statement to Neely that he needed money because he was in the policy business with Charles Moore.
>
> Courts have recognized the grave danger of this kind of prejudice and have required "impreg-

* Defendants objected to the introduction of this hearsay in a joint trial, even before the dismissal of the conspiracy count, on the ground that it was not in furtherance of the conspiracy and that its prejudicial effect outweighed its probative value. (TR 1503, 2771, 2865, 3192, 3196, 3201)

nable" safeguards to protect against it. See Blumenthal v. United States, 332 U.S. 539, 559-560, 68 S. Ct. 248, 92 L. Ed 154 (1947). In the present case the trial judge instructed the jury to consider as to any defendant only (1) documentary evidence relating to that defendant, (2) testimony as to acts of that defendant, and (3) conversations either with that defendant or in his presence. However, he permitted the hearsay statements of a co-defendant principal to be considered against a defendant charged with aiding and abetting on the question of whether the offense has been committed, though not on the questions whether the defendant had aided and abetted. He made no attempt to itemize the evidence which had been stricken. The difficulty with this approach is that it leaves to the jury the task of mastering these abstract principles and applying them to the vast amount of evidence introduced at trial. We accept the submission that the alternative of spending hours or even days telling the jury precisely what it is supposed to forget is not demonstrably superior to the method followed by the trial judge. In our view the risk of prejudice to the taxpayer defendants by reason of the joinder was so great that "no amount of cautionary instructions should have undone the harm." United States v. Kelly, 349 F.2d 720, 758, (2d Cir. 1965), cert. denied, 384 U.S. 947, 86 S. Ct. 1467, 16 L. Ed 2d 544 (1966). See United States v. Patrisso, 262 F2d 194 (2d Cir. 1958)

It is regrettable that the trial court had to confront substantial motions for severances after five weeks of trial. Since the testimony of Mrs. Neely provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or,

> as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors. See United States v. Agueci, 310 F2d 817, 840-841, 99 A.L.R. 2d 478 (2d Cir. 1962), cert. denied, 372 U.S. 959, 83 S. Ct. 1016, 10 L. Ed 2d 12 (1963); Panel Discussion, The Problems of Long Criminal Trials, 34 F.R.D. 155, 158-161 (1963) (statement of Judge Weinfeld)."

We further submit that the court's charge could not cure the prejudice created by the joint trial. As this court said in United States v. Wolfson, 427, F2d 862, 869-870 (2 Cir. 1970):

> "Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by Krulewitch v. United States 336 U.S. 440, 69 S. Ct. 716 and Delli Paoli v. United States 352 U.S. 232 77 S. Ct. 294 and finally resolved realistically by Burton v. United States 391 U.S. 123, 88 S. Ct. 1620. In short no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard or slate. Even had the court earlier in the trial by the strongest instructions told the jury that the stock purchase fraud and four weeks of testimony thereon were to be expunged from their minds, this court would doubt (along with Mr. Justice Jackson and others) that such mental gymnastics would be possible. Whether instructions timely given would have enabled the jury to deliberate on the real question ultimately posed by the court - - - an appellate court will never know, but our developed concepts of a fair trial call for serious considerations of the likelihood of prejudice."

The question presented is not whether the jury reached the right result or whether the record supports the conviction absent the evidence which would not have been admissible against the defendant. It is rather what effect the inadmissible evidence had, or reasonably may be taken to have had upon the jury's decision. This Court should judge that question not necessarily by the way this court would react, but rather with allowance for how a reasonable jury might react to such evidence. If the evidence had substantial influence upon the verdict or if one is in grave doubt as to whether the evidence had substantial influence, the conviction cannot stand. Kotteakos v. United States 328 U.S. 750 66 S. Ct. 1239 (1946)

POINT II

THE DEFENDANTS WERE ENTITLED TO A SEVERANCE AND NEW TRIAL ON THE GROUND THAT THE GOVERNMENT DID NOT ALLEGE THE CONSPIRACY IN GOOD FAITH

Even if this court concludes that the inadmissible evidence did not have substantial influence, this Court should reverse the conviction on the ground that the conspiracy count was not alleged by the government on good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial. In United States v. Acken 373 F2d 294 (2 Cir. 1966) this court said:

> "Where joinder was originally proper under Fed. R. Crim. Pro. 8(b) - - - a motion for severance after the count justifying joinder (here the conspiracy count) is dismissed, will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial."

The original indictment suggested the possibility that multiple conspiracies had been charged as one in order to bring all of the defendants into one case with the result that they would be prejudiced by evidence, which would otherwise be inadmissible. In the pre-trial severance motion, this potential problem was pointed out, as follows:

> "It is obvious that the prosecution is dealing here with small separate conspiracies, all stuffed together in a single conspiratorial Count Eight. Clearly, had all the defendants charged in the separate counts alleging §1955 violations been part of one "illegal gambling business", the government would not need to allege such a business in separate counts naming the jurisdictional minimum number of defendants.
>
> It follows from the above that movant will be prejudiced by the introduction of substantial complex testimony and massive documentary evidence which would otherwise be admissible against him. His defense on the substantive counts will be tainted by the admission of evidence on the conspiracy counts, which evidence is admissible only upon proof first that a conspiracy exists, but which in reality is allowed to come in subject to connection. Even under the most unexceptional instructions by the court, no jury will be able to escape unwarranted imputations of movant's guilt. In order to prevent such prejudice to movant, the court should order a severance under Fed.R.Crim.P. 14."

The government's original wrong was compounded when it obtained a substantially identical superseding indictment only three days before trial. Even if arguendo the prosecution believed in 1975 that it might, by the time of trial, be able to establish a single conspiracy, it knew at the time it superseded that it could not. Its only witness on this point, Agent Harker, was unable to establish a single conspiracy, even as to the New York "legs". No proof whatever was offered to show the connection between the New York "legs" and the New Jersey "operations", which might, according to the prosecutor's own concession, have involved three additional "legs". (TR 5507) On these facts there is no other conclusion, but that the government caused the improper joinder in a bad faith attempt to secure a tactical advantage over the defendants. Its bad faith is underscored by the prosecutor's own summation, in which, over objection, he attempted to prove the third substantive count by arguing the evidence which related only to the first two substantive counts and the unproven New Jersey charges.

POINT III

JAMES NAPOLI JR. HAS STANDING TO SUPPRESS THE FRUITS OF THE ELECTRONIC SURVEILLANCE CONDUCTED AT THE HIWAY LOUNGE

Prior to trial, James Napoli, Sr., Jr. and other defendants moved to suppress the fruits of electronic surveillance

conducted at the premises of apartment 309 at 815 27th Avenue, Queens, New York, 161-20 91st Street, Howard Beach, New York and the Hiway Lounge in Brooklyn, New York, pursuant to court authorization. (A 82)

Conversations of the Napolis and other defendants were seized, pursuant to the court orders, in April, May and June 1973 at the Hiway Lounge.* Those seized conversations were the only evidence which if admissible, could be considered in determining the question of the Napolis' guilt on count three. No conversations of the Napolis were seized at either of the other two locations.

Prior to trial the court held a hearing on standing to suppress the electronic surveillance at the Hiway Lounge. The defendants Napoli called Raphaela Pascocello as their sole witness. Her affidavit was previously filed.

Mrs. Pascocello testified that James Napoli, Sr. was her brother and that his son, James Napoli, Jr. was her nephew. (H 8-9, A 173-174) She said that her husband Anthony, who died in 1970 was the owner of the Ampas Tavern, Inc. which operated the Hiway Lounge. (H 9-10, A 174-175) The government stipulated that State Liquor

* All the conversations seized during HiWay III were suppressed with the government's consent on the grounds that the tapes had not been timely sealed.

Authority records indicated that a liquor license was issued by the State to Ampas Tavern, Inc. doing business as the Hiway Lounge. (H 11, A 176)

Mrs. Pascocello testified that after her husband's death, she inherited all of the stock of Ampas Tavern, Inc. The assets of Ampas included the business operating as the Hiway Lounge and the building where that business was located at 326 Metropolitan Avenue in Brooklyn. (H 11-12, A 176-177) When her husband died she asked her brother, James Napoli, Sr., to take over the whole operation of the Hiway Lounge and the building. She further asked James Napoli, Jr. to assist his father in running the operation. The keys to the Hiway Lounge were in possession of James Napoli, Sr., Jr. and the bartender. (H 13-14, 23, A 178-179)

Bills for the Hiway were paid by checks. The checks were drawn and brought to her by James Napoli, Jr. It was the responsibility of James Napoli, Sr. and Jr. to open and close the Hiway and to hire help. (H 14-15, A 179-180)

She testified that she had not gone to the Hiway since her husband's death and has done nothing in connection with the Hiway for the last five years since James Napoli, Sr. and Jr. took over everything. (H 28-29, 31)

No evidence to contradict the testimony of Mrs. Pascocello was offered by the government.

The motions to suppress the fruits of the electronic surveillance at the Hiway Lounge as well as at apartment 309 were based in part upon:

> "[T]he surreptitious entry by agents of the Federal Bureau of Investigation into the subject premises for the purpose of installing and repairing the authorized surveillance equipment, in one instance pursuant to an express court order and in the other case without specific authorization in the court order, was unlawful and therefore, commands suppression." (A 83-84)

The motions for suppression were denied on all grounds prior to trial and the court indicated it would file a memorandum of decision after the jury made its determination. (A 138-139)

After the jury returned its verdict, the court filed a Memorandum of Decision and Order dated October 14, 1976. (A 82-144) With regard to the issue of standing the court held that:

> "[a] synthesis of the leading case on the issue Brown v. United States, 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, (1973), seems to indicate that standing devolves on a defendant only where he was present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched." (A 128)

Thereafter the Court denied standing to suppress seizures at the Hiway Lounge to all defendants other than James Napoli, Sr. In reaching that result the Court said:

> "A different situation lies with respect to defendant Napoli, Sr. and his right to challenge the forced entry into the Hiway Lounge. At the suppression hearing had herein, Napoli, Sr.'s sister, Mrs. Pascocello, testified as to the corporate structure behind the lounge's operations. After her husband's death she requested that Napoli, Sr. undertake the operations of the lounge and parent corporation Ampas Tavern, Inc. Mrs. Pascocello, however, remained corporate head and continued as the sole owner of the Hiway Lounge.
>
> Though Napoli, Sr. used the Hiway Lounge solely for his gambling enterprise, he is not denied standing. His use of the premises for illegal purposes was with the knowledge and consent of the landlord, Mrs. Pascocello. Napoli, Sr. was the sole tenant in possession of the premises. The court finds, therefore, that he has standing to challenge the admissibility of the tapes based on the government's surreptitious entry into the Hiway Lounge on the two occasions, i.e. prior to the interceptions pursuant to the April 12, 1973 Hiway I order and pursuant to Judge Judd's May 2nd, 1973 order. (See text, infra at 54-55).[12]" (A 129-130)

In footnote [12] referred to above the court stated:

> "The court finds that no other defendant, specifically James Napoli, Jr., had an interest in the premises sufficient to confer standing." (A 142)

In denying standing at the Hiway Lounge to all defendants but Napoli, Sr., the District Court, we submit either improperly applied the standing alternatives of Brown v. United States, supra, or ignored the fact that each of the defendants were present when his conversation was seized. In addition, the court seems to have overlooked the fact that Mrs. Pascocella's

testimony regarding James Napoli, Jr. was almost identical to her testimony regarding James Napoli, Sr.

The leading standing cases involving traditional searches and seizures are Jones v. United States, 362 U.S. 257 (1960) and Brown v. United States, 411 U.S. 223 (1973). The synthesis of these cases to the extent here relevant, is that a defendant has standing where he claims:

> (1) that he was present on the premises at the time of the search; or
> (2) that he had a proprietary or possessary interest in the premises.

Although the Jones and Brown cases concerned physical goods, certainly seized communication are afforded the same protection. Silverman v. United States 365 U.S. 501 (1961) Katz v. United States 389 U.S. 347 (1967).

In eavesdrop cases the standing requirement of traditional search and seizure cases is considerably relaxed. In Katz v. United States, 389 U.S. 347 (1967), the eavesdrop device was placed on the "outside of a public telephone booth" apparently before the defendant entered it. 389 U.S. at 348 (emphasis added). The Court held that the defendant had standing to attack the eavesdropping as violating

> "the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed did not happen to penetrate the wall of the booth can have no constitutional significance." Id. at 353.

The Supreme Court's leading decision on standing to suppress evidence of unlawful electronic surveillance, Alderman v. United States 394 U.S. 165, 176 (1969), held that:

> "[A]ny petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment rights to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations."

Therefore under the holding in Alderman, supra, it seems clear that all defendants have standing to suppress their own conversations that were unlawfully seized. In addition, the decisions in Jones and Brown would provide all the defendants whose conversations were seized at the Hiway with standing since they were obviously at the premises at the time of the seizure.

Moreover, the holdings in Alderman, Jones and Brown would provide both Napolis with standing to supress not only their own conversations but all conversation seized at the Hiway since they had a possessory interest in the Hiway premises at the time of the seizure.

Baker v. United States, 401 F.2d 958, 980 (D.C. Cir. 1968) fully supports our position. There the defendant had a key to the hotel suite of one Black and was welcome to use it at any time. He frequently used the suite and its telephone. Unknown to defendant Baker, the suite had been "bugged". All of the defendant's own conversations were suppressed by the district court. On appeal Defendant further argued that all conversations should have been suppressed, even if he was not present. Id. at 982. Following Jones v. United States, 362 U.S. 257 (1960), the court agreed with the defendant stating (id. at 983-84):

> "Appellant's interest in the Black suite warranted his expectation of freedom from governmental intrusion, and any 'bugging' of those premises was a violation of his privacy.
>
> * * * *
>
> Here, we have concluded that appellant's relationships to and interest in the Black suite made those premises, as to him a constitutionally protected area . . . . This was sufficient to confer on him standing to suppress any evidence garnered through electronic surveillance of the Black suite, whether or not he was a participant in, or present at, particular overheard conversations." (footnotes omitted and emphasis added).

The defendants Napoli clearly had a greater interest in the Hiway Lounge and the building housing it than defendant in Baker, who merely had a key and was welcome to use the suite.

Accordingly for the reasons stated, we submit that James Napoli, Jr. is entitled to the same standing afforded his father.

We also maintain that both James Napoli, Sr. and Jr. as well as other defendants whose conversations were seized are entitled to standing to suppress the fruits of the electronic surveillance for the following reasons.

18 U.S.C. § 2518 (10) (a) provides in pertinent part as follows:

> "Any aggrieved person in any trial - - - before any court of the United States - - - may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom on the grounds that -
>
> (i) the communication was unlawfully intercepted or
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval."

Section 2510 (ii) of Title 18 defines "aggrieved person" as:

> "A person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

It is clear from the evidence at trial, from the tapes of the intercepted communication and from the affidavits and court authorization for the interceptions that James Napoli, Sr., and Jr. were both parties to the intercepted oral communication and persons against whom the interception was directed.

It is equally clear that both James Napoli, Sr. and Jr. moved to suppress the intercepted communication on all three grounds set forth in 18 U.S.C. § 2518 (10). The specific grounds alleged for suppression are set forth in the court's memorandum and order (A 83-84) and do not bear repeating here. Suffice it to say that each of the specific grounds raised would fall within the confines of 18 U.S.C. § 2518 (10). For example, the allegation that the surreptitious entry by agents without specific court authorization put in issue whether the communication was unlawfully intercepted, whether the order of authorization under which the interception was made was insufficient on its face and whether the interception was made in conformity with the court authorization. The allegation that the court ordered the surreptitious entry on one occasion would put in issue whether the communication was unlawfully intercepted since the statute does not permit such an authorization.

Accordingly, under the clear language of §§ 2510 and 2518 the defendants Napoli have standing.

Aside from the above quoted statute, decisional law would also grant standing to the defendants Napolis and the other defendants as "persons aggrieved" by the search. Spinelli v. United States 382 F.2d 871 (8 Cir. 1967), reversed on other grounds, 393 U.S. 410 (1969) is directly on point. There the Court held that it was the right to use the premises, rather than ownership, that determines whether a person is aggrieved by an unlawful search. In reaching that result the Court said at 382 F2 878-9:

> "To have standing to object to a search under Rule 41(e) the defendant must be the 'person aggrieved' by the search. The Fourth Amendment to the Constitution is aimed at the protection of the privacy of citizens. Boyd v. United States, 116 U.S. 616,630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Therefore, to be aggrieved by a search in violation of this Amendment a person must be able to show that his privacy was invaded by the search. Prior to Jones, most of the courts applied strict doctrines of common law property rights and required for standing a showing of some very significant possessory interest in the authority and held that if the defendant could show that he was legally upon the premises and the fruits of the search were proposed to be used against him, his privacy had been invaded to the degree necessary to give him standing to object to the search.
>
> In United States v. Miguel, 340 F.2d 812, 814 (n.2) (2 Cir. 1965) cert. denied 382 U.S. 859, 86 S.Ct. 116, 15 L.Ed.2d 97, the court held that a lobby of a multi-tenant apartment was not within the protection of appellant's dwelling, but significantly stated:

'Miguel did not own the apartment on the sixteenth floor. The tenant was Miss Almerio Lewis, who allowed appellant to stay there from time to time and keep his clothes there. This gave him standing under Rule 41(e) Fed.Rules of Cr.Proc. to object to a search of the apartment of Miss Lewis.'

In Foster v. United States, 281 F.2d 310 (8 Cir. 1960) we held a person using the back room of a tavern with the consent of the manager, who was his wife, might have standing to object to the search of that room even though he was absent and his wife consented to the search.

We believe Jones, Miguel, and Foster, clearly indicate that it is the right to use the premises that is a factor determinative of standing. If the defendant is legally occupying, or has been granted a right to occupy the premises, even though he is not physically present at the time of the search, then his privacy has been invaded by a search of these premises. As a person so aggrieved by the search he has a right to object, and to do so he need not allege his specific proprietary interest, i.e., owner, lessee, business invitee, etc. Nor is he required to take the stand to establish his particular interest."

POINT IV

JAMES NAPOLI JR. ADOPTS ALL LEGAL ISSUES RAISED AND ARGUMENTS ADVANCED BY ALL CO APPELLANTS

In order to avoid duplication each appellant has been assigned different issues to brief and argue. Accordingly,

appellant James Napoli, Jr., pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure hereby adopts to the extent pertinent all legal issues raised and arguments advanced by all co-appellants.

CONCLUSION

The decision should be reversed and the case remanded for a separate trial.

Respectfully submitted,

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